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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No. 470

STONYBROOK, INC.,

Appellant,

v.

STATE OF CONNECTICUT,

Appellee.

JURISDICTIONAL STATEMENT ON APPEAL FROM THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

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ON APPEAL FROM THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Errors of the State of Connecticut, entered on May 8, 1962 and announced on May 22, 1962, affirming the conviction of appellant by the Court of Common Pleas, Fairfield County, Connecticut, for violation of certain provisions of the Building Code of the Town of Stratford, Connecticut. This Statement is submitted to show that this Court has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Errors is reported at 181 A. 2d 661 and in the May 22, 1962 issue of the Connecticut Law Journal, Vol. XXIII, No. 25, at pp. 11-14, and

is set forth in Appendix A hereof. The judgment of the Supreme Court of Errors is set forth in Appendix B hereof. The opinion of the Court of Common Pleas has not been reported, but is set forth as transcribed in Appendix C hereof.

Jurisdiction

Appellant was convicted by the Court of Common Pleas of 400 violations of Section 206 of the 1943 Building Code of the Town of Stratford and of 54 violations of Section 3707 of that Code, in a judgment dated August 27, 1958. The judgment was appealed to the Supreme Court of Errors, which affirmed appellant's conviction in an opinion and judgment entered on May 8, 1962 and announced on May 22, 1962. A timely motion for reargument was denied in an order dated June 9, 1962. Appellant filed its notice of appeal in the Supreme Court of Errors on August 1, 1962. The jurisdiction of this Court to review the judgment below by direct appeal is conferred by 28 U.S.C. § 1257(2) and 28 U.S.C. § 2101(c). The following decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case: *Poulos* v. *New Hampshire*, 345 U.S. 395, 402 (1953); *Jamison* v. *Texas*, 318 U.S. 413, 414 (1943); *King Mfg. Co.*, v. *Augusta*, 277 U.S. 100 (1928).

Questions Presented

1. Where permanent defense housing is constructed by the United States without complying with certain requirements of the building code adopted by the municipality in which the housing is located and such housing eventually is sold to a private purchaser, both as expressly authorized by the Lanham Act, does the Lanham Act invalidate a criminal conviction of the purchaser for violations of the municipal building code based upon the manner in which the

housing was constructed by the United States and where the use of the property has not been changed and does not constitute a danger to public health or safety?

2. Does the conviction of appellant for violations of the Stratford, Connecticut building code under circumstances referred to in the above question interfere with the disposition by the United States of its property in violation of the Property Clause of the Constitution, particularly in view of the fact that the United States has legal title to and a substantial security interest in the property under a mortgage deed, and deprive appellant of its property in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution?

3. Does Section 502 of the Stratford building code, as construed below, unreasonably discriminate in violation of the Fourteenth Amendment against the United States and against appellant as one who dealt with the United States in permitting the continuation of pre-existing, non-conforming uses which were lawful under the prior Stratford building code while prohibiting the continuation of pre-existing, non-conforming uses which were lawful under the Lanham Act?

Statutes Involved

The validity of Sections 206, 502 and 3707 of the Stratford Building Code as applied to appellant is involved in this appeal. An ordinance of the Town of Stratford, adopted September 27, 1943, established the Uniform Building Code, 1940 Edition, of the Pacific Coast Building Officials' Conference, as amended in certain respects by the ordinance, as the building code of the Town. The ordinance and code are in the record as State's Exh. E. Section 206 is on page 25, Section 502 is on page 36 and Section 3707 is on pages 241-242 of the said 1940 Edition. The pertinent provisions

of those Sections, as well as other relevant provisions of the building code, the Lanham Act and the Constitution, are set forth in Appendix D hereof.

Statement

The Lanham Act, as enacted on October 14, 1940 and amended from time to time thereafter, authorized the United States to provide low-cost housing for persons engaged in national-defense activities where there was an acute shortage of housing which could not be provided for by private capital. 54 Stat. 1125, as amended, 42 U.S.C. § 1521, *et seq.* The policy of the Act was declared to be "to further the national defense by providing housing in those areas where it cannot otherwise be provided by private enterprise when needed, and that such housing may be sold and disposed of as expeditiously as possible." 42 U.S.C. § 1524. Both permanent and temporary housing could be constructed, but temporary housing was to be built if there was "no reasonable prospect of disposing of such housing to meet a need extending beyond the emergency" giving rise to the Act. 42 U.S.C. § 1521 (b). The Government was authorized to plan, design, construct, etc., such defense housing and to "do all things necessary in connection therewith to carry out the purposes of" the Act "without regard to . . . municipal laws, ordinances, rules or regulations relating to plans and specifications or forms of contract," *ibid.*, but was required to consult with local public officials and housing authorities "to the end that projects constructed under the [Act] shall, so far as may be practicable, conform in location and design to local planning and tradition," 42 U.S.C. § 1545, and to "establish reasonable standards of safety, convenience, and health," 42 U.S.C. § 1548. The Government also was authorized to maintain, operate, sell, etc., the

housing "[n]otwithstanding any other provision of law, whether relating to the acquisition, handling, or disposal of real or other property by the United States or to other matters," 42 U.S.C. § 1544, but "in disposing of said housing consideration shall be given to its full market value . . ." 42 U.S.C. § 1524.

Stonybrook Gardens was constructed by the United States, in 1941 and 1942, under the Lanham Act to provide permanent, low-cost defense housing in Stratford, Connecticut. 197 buildings containing 400 apartments or dwelling units were erected. These buildings did not fully comply with the requirements of the Stratford building code. Among other things, the Government did not obtain certificates of occupancy prior to occupancy of the buildings as required by the building code and did not construct the furnace-room floors in the manner required by that ordinance.

On September 27, 1943, Stratford enacted a new building code which repealed the building code—enacted in 1925—in effect at the time the buildings in Stonybrook Gardens were constructed. Section 206 of the 1943 building code provided that "[n]o building shall be occupied in any part thereof unless or until a certificate of occupancy has been issued by the building inspector," and that a certificate is to be issued upon a finding that the building complies with the requirements of the building code and other applicable laws. Section 3707 established specifications for furnace-room floors generally similar to but differing in some particulars from the specifications provided in the 1925 building code. At no time during its ownership of Stonybrook Gardens did the United States obtain certificates of occupancy or bring the furnace-room floors into compliance with the specifications set forth in Section 3707.

Stonybrook Gardens was sold at a public sale and, on January 17, 1956, conveyed by the United States to appellant's predecessor for $1,328,700, of which $200,000 was paid down and the balance secured by a mortgage on the property. On January 10, 1957, Stonybrook Gardens was conveyed to appellant, subject to the mortgage intgrest of the United States. The property was in substantially the same condition when sold as when constructed by the United States, except for ordinary wear and tear, and the private owners continued the same use of the property by rental of the apartments to tenants for living accommodations.

A criminal information, dated April 1, 1958, charged appellant, in five counts, as owner of Stonybrook Gardens with violating the building code and other municipal regulations of the Town of Stratford. Appellant was convicted, by the Court of Common Pleas for the County of Fairfield, Connecticut, under two of the counts of 400 violations of the requirement for certificates of occupancy in Section 206 of the 1943 building code (one violation for each dwelling unit) and of 54 violations of the requirement in Section 3707 of that code with respect to furnace-room floors (appellant had reconstructed the furnace-room floors in all but 54 of the dwelling units so as to meet the specifications of Section 3707). A fine of $5.00 for each violation, totalling $2,270.00, was imposed by the Court. Appellant contended in the Court of Common Pleas, among other things, that the buildings in Stonybrook Gardens, by reason of the Constitution of the United States and the provisions of the Lanham Act, did not have to comply with the Stratford building code while owned by the United States and constituted a legal existing use (the use of the property not having been changed after sale by the United States) in the hands of appellant. See the

Fourth Section, paragraph 34, of the Finding by the Court of Common Pleas. The denial of this contention was included in the Assignment of Errors on appeal to the Supreme Court of Errors of the State of Connecticut.

In its brief and oral argument before the Supreme Court of Errors, appellant contended, among other things, that the provisions of the building code under which appellant was convicted were inapplicable by reason of the Property Clause of the Constitution and the express provisions of the Lanham Act, that this inapplicability was not affected by the Government's sale of the property, and that appellant would be deprived of its property without due process of law in violation of the Federal and State constitutions if the conviction was sustained. The Supreme Court of Errors held that Stonybrook Gardens did not have to comply with the building code while owned by the United States, but that this "immunity" conferred by the Lanham Act ended upon sale of the property even though the United States technically retained legal title under the mortgage deed. As construed by that Court, the Lanham Act "neither purports to, nor does, confer any authority on one in the position of [appellant], or on anyone other than the government or one acting on its behalf, to ignore, or fail to comply with, the provisions of a local building code," and the court below also held that "no such authority is conferred by the federal constitution." (Appendix A, at p. 30).

A principal contention made below by appellant was that the building code by its own terms did not require compliance with the provisions under which appellant was convicted because Stonybrook Gardens constituted a lawful non-conforming use in existence when the code was enacted in 1943. Various sections of the code were relied upon as indicating that such lawful non-conforming uses need not

comply with the requirements concerning certificates of occupancy and furnace-room floors, and in particular Section 502 which provides, in part, that "[b]uildings in existence at the time of the passage of this Code, may have their existing use or occupancy continued, if such use or occupancy was legal at the time of the passage of this Code, provided such continued use is not dangerous to life."[1] Stonybrook Gardens was occupied and in use in 1943 when the building code was enacted, the Lanham Act expressly made such use legal at the time, and there was no finding that continuance of the use was dangerous to life. The Supreme Court of Errors disagreed only with respect to the "basic issue" of "whether the use or occupancy of the housing units was legal at the time of the passage of the present building code in 1943 within the meaning of § 502, quoted above." (Appendix A, p. 31.)

With respect to this "basic issue," however, the Supreme Court of Errors held that the use and occupancy of Stonybrook Gardens in 1943 were not "legal," within the meaning of that term as used in Section 502, because the buildings "did not conform to the provisions of the 1925 building code, which was in existence prior to the time of the construction of the units." While the Lanham Act conferred "immunity" on the Government insofar as compliance with the 1925 code was concerned, this immunity did not make the buildings "legal non-conforming uses so as to be pro-

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[1] Section 401(O) of the code defines "occupancy" as "the purpose for which a building is used or intended to be used. Change of occupancy is not intended to include change of tenants or proprietors." Thus, "use" and "occupancy" in Section 502 have the same meanings, and an existing use or occupancy does not terminate by reasons of changes in tenancy or in ownership. See Appendix A, p. 31. As pointed out below, this interpretation of the code would not have made all of its provisions inapplicable to Stonybrook Gardens. Section 105 expressly requires conformity by existing buildings with provisions relating to maintenance. See, also, Section 104.

tected by the present code." (Appendix A, pp. 31, 32). This interpretation of "legal" in Section 502, as being limited to uses complying with the prior building code and excluding uses complying with supervening federal law, was neither enunciated by the Court of Common Pleas (see Appendix C, p. 39) nor urged by appellee in its brief to the Supreme Court of Errors. A Motion by Defendant-Appellant for Reargument contended that this interpretation of Section 502 discriminated against the United States and those with whom it deals and hindered the United States in the disposition of its property, contrary to the Property and Supremacy Clauses of the Constitution and to the equal protection and due process requirements of the Fourteenth Amendment. The Motion for Reargument was denied by the Supreme Court of Errors without opinion.

The Questions Are Substantial

The construction given by the Connecticut Supreme Court of Errors to Section 502 and other provisions of the Stratford building code, however strained or arbitrary that construction may appear to be, is binding on this Court and on appellant for purposes of this appeal. *Poulos* v. *New Hampshire*, 345 U.S. 395, 402 (1953). This Court does have jurisdiction on appeal, however, "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. § 1257(2). The term "statute of any state" includes municipal ordinances such as the Stratford building code. *Poulos* v. *New Hampshire*, *supra* at p. 402; *Jamison* v. *Texas*, 318 U.S. 413, 414 (1943); *King Mfg. Co.* v. *Augusta*, 277 U.S. 100 (1928). Thus, this Court has jurisdiction of this appeal to review the rejection by the Supreme Court of Errors of appellant's contentions

that the provisions of the building code, if construed to apply to appellant under the circumstances here involved, are repugnant to the Lanham Act and to the Constitution of the United States.

Although conceding that housing could be constructed and operated by the United States under the Lanham Act without complying with local building codes and other restrictive regulations, the Supreme Court of Errors has held that private purchasers of such property from the United States may be subjected to criminal sanctions because of the non-compliance with local ordinances even though no change is made in the use or occupancy of the housing and the non-compliance does not endanger the public health or safety. This is true, so the court below has held, despite the fact that housing constructed in accordance with a prior building code need not comply with the present code in such circumstances.

The substantial nature of the statutory and constitutional questions raised by these holdings seems apparent and is pointed out in some detail below. We note at this time that these issues are also of large importance both to the United States and to purchasers of property from the United States. The disposition by the United States of its property for a reasonable price obviously will be seriously hindered if the continued use of that property for the purpose for which it was designed and constructed may constitute a criminal act by private purchasers of the property. Private purchasers of such properties may find themselves subjected to criminal penalties, as has happened to appellant, even though they have done nothing that the United States did not do when it owned the property, and may be forced either to demolish the buildings or undergo substantial expense so as to bring them into compliance with local requirements. The Public Housing Administration,

Housing and Home Finance Agency, disposed of almost 1,000,000 housing units erected under the Lanham Act and related programs, much of it by sale to veterans and other private purchasers.[2] This plainly is a matter that transcends the instant case.

I

The Application of the Stratford Building Code to Appellant Is Contrary to the Lanham Act

The Lanham Act was enacted, on October 14, 1940, at a time when the United States was engaged in a strenuous effort to bolster its defenses in view of the threat posed by the Axis Powers. The rapid expansion of military facilities and defense plants, with the concomitant influx of military personnel, workers and their families, created acute housing shortages in many areas. The Act enabled the Government "to provide housing for persons engaged in national-defense activities, and their families, in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed."

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[2] Twelfth Annual Report, Housing and Home Finance Agency, 196-197 (1958). Of these units, some 627,000 were constructed under the Lanham Act proper. The total Government investment in the Lanham Act and other properties disposed of approximated $2,303,000,000. Properties costing about $1,092,000,000 were transferred without reimbursement to local communities and to other Government agencies. As of the end of 1958, when the disposal program was virtually completed, some $630,000,000 had been turned back to the Treasury and purchase money mortgages in the amount of about $177,000,000 were held by the Government as the result of the sale and operation of other such properties. HHFA estimated that about 82½% of the costs of the housing had been recouped through the disposal program, either by sale or by utilization of the properties to meet other needs, with most of the loss being accounted for by the expected demolition of temporary housing. *Ibid.* See, also, Eleventh Annual Report, Housing and Home Finance Agency, 183-184 (1957).

54 Stat. 1125-1126. As revised from time to time, the Act was utilized during World War II as the primary means by which the Government alleviated the even more acute and widespread wartime housing shortages in areas where military and defense production establishments were concentrated. See, generally, Robinson & Weinstein, *The Federal Government and Housing*, 1952 Wis. L.R. 581, 605-606. The Lanham Act was also utilized in meeting the need for veterans housing after the end of World War II. 59 Stat. 260, as amended, 42 U.S.C. §§ 1571-1573.[3]

Section 1(b) authorized the Administrator, by "contract or otherwise (without regard to . . . any Federal, State, or municipal laws, ordinances, rules, or regulations relating to plans and specifications or forms of contract, the approval thereof or the submission of estimates therefor)," to plan, design, construct, etc., the housing "and do all things necessary in connection therewith to carry out the purposes" of the Act. 54 Stat. 1126, 42 U.S.C. § 1521(b). As stated in *George H. Evans & Co.* v. *United States*, 169 F.2d 500, 503 (C.A. 3, 1948): "The government was attempting rapid construction to meet a highly critical need which threatened the success of the war effort. Compliance with the myriad local rules governing construction would have meant serious delay; hence Congress authorized the Federal Works Administrator to perform his duties 'without regard to Federal, State, or municipal laws.'"[4]

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[3] Title III of the Defense Housing and Community Facilities and Services Act of 1951, 65 Stat. 293, as amended, 42 U.S.C. § 1591 *et seq.*, was patterned largely after the Lanham Act. See H. Rept. 795, 82d Cong., 1st Sess., p. 11; S. Rept. 189, 82d Cong., 1st Sess., p. 32. That Act, however, required that housing constructed thereunder conform to local laws "relating to health and sanitation," and that permanent housing also conform to local building codes "to the maximum extent practicable, taking into consideration the availability of materials and the requirements of national defense." 42 U.S.C. § 1592d(a).

[4] In the hearings on the bill enacted as the Lanham Act, witnesses for the Government agencies that drafted the bill and would administer it

The Lanham Act was amended in a number of respects by the Act of January 21, 1942, 56 Stat. 11, so as to correct various abuses that the Congress believed had developed in the administration of the law.[5] Among other things, Section 305 of the Lanham Act (42 U.S.C. § 1545) was amended to require that: "Consultation shall be had with local public officials and local housing authorities to the end that projects constructed under the provisions of this Act shall, so far as may be practicable, conform in location and design to local planning and tradition." 54 Stat. 12. This amendment was intended, in part, to satisfy complaints about the low quality and unsightly nature of some of the housing constructed under the Act and its failure to come up to the standards of other housing in the particular area. See 87 Cong. Rec. 9684-9685, 9687-9688, and 9692. A proposal to make compliance with local standards mandatory by striking out the words "so far as may be practicable" was, however, rejected. 87 Cong. Rec. 9699. Some flexibility was believed to be necessary in order to prevent construction under the Act from being hamstrung by local building codes and other such laws, which sometimes contained arbitrary and rigid provisions making low-cost construction virtually impossible, particularly in view of the strict limitations on the cost of constructing Lanham Act housing.[6] Also, the Act required the Administrator

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testified that for the most part construction would be standardized with the same basic designs used everywhere in order to reduce costs, that local building codes varied greatly and that many such codes were so arbitrary and restrictive in nature that compliance would result in poorer housing at greatly increased costs. Hearings on H.R. 10412 before House Committee on Public Buildings and Grounds, 76th Cong., 3d Sess., pp. 38-39, 41, 58-59. See, also, the remarks by Representative Lanham, 86 Cong. Rec. 11871.

[5] See H. Rept. 1457, 77th Cong., 1st Sess.; Remarks by Representative Lanham, 87 Cong. Rec. 9277.

[6] Remarks by Representative Lanham, 87 Cong. Rec. 9679, 88 Cong. Rec. 405; by Representative Dirksen, 87 Cong. Rec. 9679; by Representa-

to "establish reasonable standards of safety, convenience, and health" (54 Stat. 1128, 42 U.S.C. § 1548), and Representative Lanham noted that these standards often were "far superior" to those established in local building codes. 88 Cong. Rec. 405.

In view of the language and legislative history of Sections 1(b) and 305, and of the reasons necessitating the exemption of Lanham Act housing from mandatory compliance with local building codes and other ordinances, it is not surprising that the courts unanimously have rejected efforts to require the housing to be constructed and operated by the United States in conformity with local laws and have upheld the constitutionality of the exemption. *United States* v. *City of Chester*, 144 F.2d 415 (C.A. 3, 1944); *United States* v. *City of Philadelphia*, 56 F. Supp. 862 (E.D. Pa., 1944), aff'd per curiam, 147 F.2d 291 (C.A. 3, 1945); *Tim* v. *City of Long Branch*, 135 N.J. L. 549, 53 A.2d 164, 171 A.L.R. 320 (1947); *Curtis* v. *Toledo Metropolitan Housing Authority*, 78 N.E. 2d 676 (Ohio App., 1947); see *State* v. *Board of Education*, 57 N.E. 2d 118, 121 (Ohio App., 1944), and unreported cases there cited.[7]

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tive Manasco, 87 Cong. Rec. 9699; and by Representative Dewey, 88 Cong. Rec. 405. It has also been noted that wartime restrictions upon the availability of materials might have made construction in conformity with some building-code requirements difficult if not impossible. *United States* v. *City of Chester*, 144 F.2d 415, 421 (C.A. 3, 1944). *High Cost of Housing*, H. Doc. 647, 80th Cong., 2d Sess., pp. 106-114, reports on the manner in which local building codes often increase the cost of housing because of lack of uniformity, failure to keep pace with developments in construction techniques, arbitrary requirements or limitations imposed at the instance of special-interest groups, and other reasons unrelated to proper building standards. As initially enacted, the Lanham Act limited the average cost to not more than $3,000 and the top cost to not more than $3,950, insofar as dwelling units constructed within the continental United States were concerned. 54 Stat. 1126. These limits were increased from time to time to $3,750 and $4,500, respectively. 42 U.S.C. § 1521(b).

[7] In *Public Housing Administration* v. *Bristol Township*, 148 F. Supp. 859 (E.D. Pa., 1956), the court refused to enjoin the Township from requiring an electrical contractor to secure building permits prior to doing

The court below conceded that these provisions immunized the United States from compliance with the Stratford Building Code in the construction and operation of Stonybrook Gardens. But, in the only reported decision on the issue, the court below also held that the Lanham Act exemption did not extend to the housing after its sale by the United States.

The Lanham Act was not intended, however, to authorize merely the construction and operation of housing by the United States; it was not intended as a means of providing permanent public housing and was not limited to the construction of temporary housing for use only during the defense and war emergency. The Congress recognized that the need for the housing in many instances would continue after the end of the emergency, and provided for the construction of permanent rather than temporary housing in areas where such a continuing need was expected to exist. But the Congress was also determined that the Government should not remain in the housing business indefinitely in competition with private enterprise and intended that the housing be sold or otherwise disposed of after the end of the emergency, if not sooner. Furthermore, the Congress intended to recoup as much as possible of the cost to the Government of the housing through such sales. The Congress could not have intended to permit these repeatedly stressed objectives of the Act to be frustrated in large measure by local communities, as would have been possible if purchasers of Lanham Act housing

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repair work on the electrical system of a Lanham Act project in order to facilitate sale of the system and the project. The Government's contract with the contractor was thought to require compliance with local codes and the securing of permits thereunder, *id.*, at p. 865; and the court was of the view that the authorization in the Lanham Act to make repairs had previously expired, so that the repairs in question could not be made pursuant to that Act and the cases cited in the text above were inapplicable, *id.*, at pp. 861-862, fn. 8.

could be subjected to criminal penalties because the housing was not constructed by the United States in strict conformity with all the local building regulations. Non-conformance with some restrictions, such as those relating to the permissible location of structures of a particular kind, could be remedied only by removal of the housing—making expeditious sale by the United States a practical impossibility. Even if reconstruction of the housing so as to achieve compliance was not physically or economically impossible, the cost of such reconstruction naturally would have a depressing effect upon offers for the housing and thus reduce the price for which it could be sold by the Government.

The Lanham Act has always provided the Administrator with authority to "sell for cash or credit, and convey" property acquired or constructed under the Act "[n]otwithstanding any other provision of law, whether relating to the acquisition, handling, or disposal of real or other property by the United States or to other matters . . ." 54 Stat. 1125, 42 U.S.C. § 1544. As originally enacted, Section 4 of the Act required that the housing be disposed of upon the end of the emergency "as promptly as may be advantageous under the circumstances and in the public interest." 54 Stat. 1127. Witnesses for the Government agencies sponsoring the bill testified that, in areas where the need for housing was expected to continue after the end of the emergency, the dwellings would be built in such a manner that they could be sold to meet that need, and that some of the money expended under the Act should be recaptured through such sales. Hearings on H.R. 10412, *supra* at pp. 30, 53, 60. Representative Lanham informed the House that one purpose of the Act was to recoup for the Treasury as much of the cost "as we can" through sale of the buildings for use as homes, and that the con-

struction should be permanent in nature where that would enhance the opportunity for such sales after the end of the emergency. 86 Cong. Rec. 11866, 11887. See, also, the remarks by Representative Lanham at 86 Cong. Rec. 11868, 11870, 11872.

We have already referred to the fact that the Lanham Act was amended in several respects by the Act of January 21, 1941 so as to correct abuses that had developed in the administration of the program. The principal abuse that the Congress intended to correct was the misapprehension by some about the purposes of the Act. As stated in H. Rept. 1457, 77th Cong., 1st Sess., pp. 3-4:

> "It was never considered by the committee that this housing should be designed for use as slum-clearance projects or to provide subsidized housing for persons of low income . . . This act is not designed to meet that need or to serve that purpose but is designed to provide houses for persons engaged in national defense and who, in the opinion of the committee, are able to pay an economic rent or to pay the fair value for houses which they might purchase. *It is the further hope and purpose of the committee that the funds expanded under the authority of this act, insofar as possible, may be recovered by the Treasury.* To use the houses for slum clearance or as subsidized housing units would defeat that purpose and could call for further drains on the Treasury by way of rent subsidy.
>
> . . . . . .
>
> "The committee repeat that this act is not designed as a slum-clearance measure; it is not intended that the quarters so constructed should be used for permanent leasing of residential quarters to persons of

low income. *Its purpose specifically is to provide housing, which is not otherwise available and cannot be provided by private capital, for persons engaged in congested areas of national defense during the present emergency, on a rental or sale basis, and that after the emergency has passed the houses not previously disposed of shall be sold and the value of them, insofar as possible, returned to the Treasury.*" [Emphasis added.]

Similar statements were made by Representative Lanham on the floor of the House.[8]

To reinforce these views, Section 4 of the Lanham Act was rewritten to read, in part, as follows:

> "It is is hereby declared to be the policy of this title to further the national defense by providing housing in those areas where it cannot otherwise be provided by private enterprise when needed, and that such housing may be sold and disposed of as expeditiously as possible: *Provided*, That in disposing of said housing consideration shall be given to its full market value and said housing or any part thereof shall not, unless specifically authorized by Congress, be conveyed to any public or private agency organized for slum clearance or to provide subsidized housing for persons of low income: . . ." 56 Stat. 12, 42 U.S.C., § 1524.

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[8] "In other words, this is not to be subsidized housing. This is housing that we want to sell so that we may recoup for the Treasury as much of this expenditure as possible, and at the same time provide these homes for permanent occupation by their purchasers." 87 Cong. Rec. 9278. See, also, 87 Cong. Rec. 9279; 88 Cong. Rec. 400-403. The bill reported to and initially passed by the Senate differed substantially from that adopted by the House. See S. Rept. 918, 77th Cong., 1st Sess. As reported by

The Congress foresaw that the need for Lanham Act housing in some areas probably would not extend beyond the war, so that the housing would be difficult to sell except through undue competition with private enterprise. The Act of January 21, 1943, therefore, required the construction of temporary units where that situation was expected to exist. 56 Stat. 11, 42 U.S.C. § 1421(b). But in those localities where the need was expected to continue after the end of the emergency and permanent housing, such as Stonybrook Gardens, was constructed, the Congress was concerned that the houses be sufficiently attractive to be saleable. "In short, if the houses are to be sold to advantage, they should be 'saleable' in the minds of prospective purchasers. The bill provides appropriately for consultation with local authorities and local housing agencies in the matter of the design and location of such housing." H. Rept. 1457, *supra*, at p. 5.[9] As we have shown, at p. 13 *supra*, however, the Congress in requiring *consultation* with local officials refused to require *compliance* with local standards.

Subsequent enactments provided for disposition of certain Lanham Act housing (usually temporary housing) to educational institutions, public housing authorities, etc. See 42 U.S.C. §§ 1552, 1553, 1572, 1575, 1581, 1584, 1586, 1588, 1589, 1589c. Except in those instances where disposition in some other manner was directed, however, the Congress continued to insist upon sale of the Lanham Act housing. The Housing Act of 1950 required disposition of

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the conference committee and enacted into law, however, the bill adhered for the most part to the House version insofar as relevant here. See H. Rept. 1589, 77th Cong., 2d Sess., and 88 Cong. Rec. 400.

[9] See, also, the remarks by Representative Lanham, 88 Cong. Rec. 403. The bill also increased the cost limitations so as to allow construction of housing more readily saleable. Remarks by Representative Lanham, 87 Cong. Rec. 9278.

permanent housing "as promptly as practicable in the public interest," and accorded certain preferences to veterans and occupants in the purchase of such housing.[10] 64 Stat. 70, 42 U.S.C. § 1587. The Housing Act of 1956 required disposition of the remaining permanent housing "as expeditiously as possible" by competive bidding without preferences. 70 Stat. 1106-1107, 42 U.S.C. § 1589d. By the end of 1958, all of the Lanham Act and similar defense housing (almost 1,000,000 units) had been disposed of by sale or otherwise. See p. 11, *supra*.

The above review of the language and legislative history of the Lanham Act and various amendments thereto demonstrates conclusively, we believe, that the purposes of the Act were not limited to the construction and operation of defense housing by the United States; that the Congress at all times contemplated sale to private purchasers of permanent housing to meet the continuing need for homes expected to exist after the end of the emergency; that the Congress intended such sales to be made at the full market value of the housing for use as homes (except for certain sales to veterans) so as to recoup for the Treasury as much as possible of the cost to the Government of the Lanham Act program; and, therefore, that the Congress in exempting the construction of the housing from compliance with local building codes and other ordinances intended that exemption to run to private purchasers of the housing as well as to the Government. Cf., *Richmond Investment Co.* v. *United States*, 249 F.2d 811, 812 (C.A. 9, 1957); *Lewis* v. *United States*, 200 F.2d 183 (C.A. 9, 1952); *United States* v. *City of Philadelphia*, *supra*, 56 F. Supp., at p. 865. If so, the decision below may and should be reversed by this Court

[10] The Act of June 19, 1948, 62 Stat. 492, 42 U.S.C. § 1524, amended Section 4 of the Lanham Act to provide for sale of individual units to veterans for personal occupancy at a price not in excess of the apportioned cost of the unit where less than the market price.

without reaching the constitutional issues discussed hereafter.[11]

II

The Application of the Stratford Building Code to Appellant Is Contrary to the Constitution

A. *Interference with the Disposition by the United States of Its Property.* Article 4, Section 3, Clause 2 of the Constitution gives the Congress power "to dispose of" the property of the United States. It has often been held that the power of the United States under the Property Clause of the Constitution to dispose of its property is without limitations. *Alabama* v. *Texas*, 347 U.S. 272, 273-274 (1945), and cases there cited. The States and their subdivisions, therefore, may not interfere with the acquisition, use or disposition of Federal property without the consent of the Congress. *United States* v. *Allegheny County*, 322 U.S. 174, 182-183 (1944); *Mayo* v. *United States*, 319 U.S. 441 (1943); *United States* v. *Oregon*, 295 U.S. 1, 27-28 (1935). Nor may the States do indirectly what they cannot do directly by application of their laws to the grantees of the United States in such a manner as to interfere with their enjoyment of the property granted. *Gibson* v. *Chouteau*, 13 Wall. 92, 100 (1871).

In *Lee* v. *Osceola Imp. Dist.*, 268 U.S. 643 (1925), a local Improvement District assessed purchasers of lands from the United States for benefits accruing to the land from improvements (apparently roads) made by the District while the land was owned by the United States. This Court held that the assessment unconstitutionally

[11] The rule of restraint whereby this Court refrains from deciding substantial constitutional questions by interpreting a statute so as to avoid such questions, where fairly possible, lends further support to the interpretation of the Lanham Act urged above. *See, e.g., Lynch* v. *Overholzer*, 369 U.S. 705, 710-711 (1962).

interfered with the power of the United States to dispose of its property, and that the exaction of the tax without constitutional authority consequently deprived the landowners of due process of law in violation of the Fourteenth Amendment. In so holding, this Court stated (268 U.S., at p. 645) that:

> "It was settled many years ago that the property of the United States is exempt by the Constitution from taxation under the authority of a State so long as title remains in the United States. *Van Brocklin* v. *State of Tennessee*, 117 U.S. 151, 180. This is conceded. It is urged, however, that this rule has no application after the title has passed from the United States, and that it may then be taxed for any legitimate purposes. While this is true in reference to general taxes assessed after the United States has parted with its title, we think it clear that it is not the case where the tax is sought to be imposed for benefits accruing to the property from improvements made while it was still owned by the United States. In the *Van Brocklin Case, supra*, p. 168, it was said that the United States has the exclusive right to control and dispose of its public lands, and that 'no State can interfere with this right, or embarrass its exercise.' Obviously, however, the United States will be hindered in the disposal of lands upon which local improvements have been made, if taxes may thereafter be assessed against the purchasers for the benefits resulting from such improvements. Such a liability for the future assessment of taxes would create a serious encumbrance upon the lands, and its subsequent enforcement would accomplish indirectly the collection of a tax against the United States which could not be directly imposed."

Obviously, the United States also is indirectly hindered in its disposition of Lanham Act housing if private purchasers of that housing are subject to criminal penalties for building code violations resulting from the manner in which the housing was constructed by the United States. We submit, therefore, that the Property Clause of the Constitution deprived the Town of Stratford of any constitutional authority to apply its building code to appellant under such circumstances, and therefore that the imposition on appellant of fines for alleged violations of the building code deprived appellant of its property without due process of law in violation of the Fourteenth Amendment.

Another reason for reaching the same conclusion is provided by the fact that the United States saw fit to sell Stonybrook Gardens in large part on credit, and retains legal title to the property under a mortgage deed as security for the indebtedness of the purchasers. In *Northern Pacific R.R. Co. v. Traill County*, 115 U.S. 600, 610 (1885), this Court held that a county could not tax lands granted by the United States where the United States retained legal title as security for the payment of the cost of surveying the land, because "this security would be easily lost" if the land were liable to be sold for taxes due from the grantee. See, also, *Railway Company v. McShane*, 22 Wall. 444 (1874); *Railway Company v. Prescott*, 16 Wall. 603 (1872).[12] So, too, application of local building codes and other such ordinances to Lanham Act housing in the hands of private purchasers because of the manner in which the housing was constructed by the United States could weaken or destroy the security

[12] Of course, where the tax is levied only upon the equity of the purchaser, from the United States and such equity may be sold without disturbing the security interest of the United States, the principle of the *Traill County* case does not apply. *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 567-568 (1946). Here, however, the security of the United States as well as the equity of the purchaser is adversely affected if the housing is not usable as such because of the application of local ordinances.

of the United States by making impossible the continued use of the property for housing.

B. *Discrimination Against the United States and Those with Whom It Deals.* Section 502 of the Stratford building code authorized the continuation of the use or occupancy of buildings in existance at the time the code was enacted, without compliance with the other provisions of the code, if that use or occupancy was "legal" at the time of enactment and its continuation is not dangerous to life. The building code was enacted in 1943, after the construction of Stonybrook Gardens and during the period when the property was owned by the United States, the use and occupancy of Stonybrook Gardens has continued to be the same at all times, and the court below held that there was no basis for invoking the "dangerous to life" exception.

Whatever the Lanham Act may provide with respect to compliance by purchasers of the housing with local building codes, there can be no serious question that the construction and operation of such housing by the United States was "legal," in any normal meaning of the term, "without regard to . . . municipal laws, ordinances, rules or regulation. . . ." 42 U.S.C. §1521(b). See pp. 12-15, *supra*. The court below ruled, however, that "legal" as used in Section 502 of the Stratford building code includes only existing uses or occupancy which conformed with the prior Stratford building code in existence when the use or occupancy commenced. Because Stonybrook Gardens did not comply with the 1925 Stratford building code in effect when the housing was constructed, the use and occupancy of the housing therefore was not "legal" for purposes of Section 502 of the 1943 building code even though expressly authorized by Federal law.

The Supreme Court of Errors of Connecticut is, of course, entitled to interpret the ordinances of Connecticut munici-

palities in such manner as it chooses without interference by this Court. But if the ordinance as so interpreted unreasonably discriminates against the United States or those with whom it deals, this Court can and will strike down the ordinance as unconstitutional. In *Phillips Co. v. Dumas School Dist.*, 361 U.S. 376, 387 (1960), this Court stated that "it still remains true, as it has from the time of *M'Culloch v. Maryland*, 4 Wheat. 316, that a state may not discriminate against the United States or those with whom it deals." See, also, *United States v. City of Detroit*, 355 U.S. 466, 473 (1958). Thus, the *Phillips* case held unconstitutional a tax by a local school district on property leased from the United States and assessed against the lessee, where property leased from the State was not comparably taxed, because the tax statute "discriminates unconstitutionally against the United States and its lessees." 361 U.S., at p. 387. The same principle was applied under somewhat similar circumstances in *Moses Lake Homes v. Grant County*, 365 U.S. 744 (1961).

As construed below, the 1943 building code makes the rankest kind of discrimination against the United States and against appellant as one who dealt with the United States. Housing constructed in 1941 and 1942 by someone other than the United States in accordance with the law then applicable to such housing (the 1925 building code), may continue to be used as a "legal" pre-existing use without compliance with the 1943 building code. Housing constructed by the United States in 1941 and 1942 (Stonybrook Gardens) in accordance with the law then applicable to such housing (the Lanham Act) is not a "legal" pre-existing use without compliance with the 1943 building code. The Lanham Act required that Stonybrook Gardens be constructed in accordance with "reasonable standards of safety, convenience, and health." 42 U.S.C. 1548. There was no

claim and no showing below that this was not done, or that the standards prescribed by the 1925 building code were superior, or that any other circumstance exists which conceivably might justify this discrimination. Without such justification, the discrimination is invidious and the building code as so applied to appellant is unconstitutional.

Conclusion

For the reasons set forth above, this Court has jurisdiction of the appeal and the questions presented are substantial. Consequently, probable jurisdiction should be noted and the appeal set down for briefing and oral argument on the merits.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF ERRORS

April Term, 1962

STATE OF CONNECTICUT,

v.

STONYBROOK, INC.

Information charging the defendant with the crime of violating the building code of Stratford, brought to the Court of Common Pleas in Fairfield County and tried to the court, *Leipner, J.*; judgment of guilty and appeal by the defendant. *No error.*

Alfred L. Scanlan, of the District of Columbia bar, with whom were *Hugh A. Hoyt* and, on the brief, *John P. Maiocco, Jr., for the appellant* (defendant).

Thomas J. Dolan, with whom, on the brief, was *James J. O'Connell*, prosecuting attorney, for the appellee (state).

KING, J. The defendant was tried on a criminal information charging it, in five counts, with certain violations of municipal regulations of the town of Stratford. It was found guilty, under the first count, of permitting its dwelling units to be occupied by rent-paying tenants without its having obtained proper certificates of occupancy as required by Stratford's regulations, and, under the third count, of failing to provide noncombustible flooring under the furnaces in fifty-four of its dwelling units as required by the Stratford building code. It was found not guilty of the offenses charged in the second count, and the fourth and fifth counts were withdrawn.

The facts necessary for an understanding of our decision concerning most of the claims of error properly before us will now be summarized. On August 1, 1941, the United States government, hereinafter referred to as the government, condemned land in Stratford and began the construction of housing units under the provisions of the Lanham

Act, 54 Stat. 1125, as amended, 42 U.S.C. § 1521. The units were constructed under the supervisions of the Bridgeport housing authority and were operated for the government by that authority until June 30, 1943, when the newly established Stratford housing authority took over the operation under a lease from the government, pursuant to federal regulations, and operated the units until January 17, 1956. During this entire period of construction and operation by the government through the agency of the housing authorities, no certificates of occupancy for the housing units were ever obtained, nor did the construction fully conform to the requirements of the building code of Stratford. On January 17, 1956, the government sold the entire project to Stonybrook Gardens, Inc., a private corporation. Two hundred thousand dollars was paid on the purchase price, and a mortgage on the property was given to the government as security for the balance. Thereafter, on the same day, Stonybrook Gardens, Inc., conveyed the property to Hyman Alpert and Joseph Alpert; on January 10, 1957, they conveyed it to the defendant. Both Stonybrook Gardens, Inc., and the defendant are corporations owned by the Alperts. Before the housing units were sold by the government to Stonybrook Gardens, Inc., the Alperts met with the building inspector of Stratford and were put on notice as to the violations of the building code. At that meeting, the Alperts said that these violations would be taken care of. The violations had been noted by the building inspector when he made an inspection of the housing units in January, 1955. A copy of this inspection report was given to the Alperts before the units were purchased by them. Fifty-four furnaces in the units did not, at the commencement of the present prosecution, have noncombustible floors, as required by the building code. No certificates of occupancy had been obtained. Private owners are required by § 206 of the building code of Stratford to obtain certificates of occupancy and by § 3707 to have noncombustible floors under the furnaces of housing units such as these. The government admittedly was not bound by these provisions, since an express provision in the Lanham Act empowered the government to construct buildings under the act "with-

out regard to . . . State, or municipal laws, ordinances, rules or regulations." 54 Stat. 1126, 42 U.S.C. § 1521 (b).

The defendant, on a number of grounds, claims that it is not bound by the requirements of the building code. The first ground is that since the government has retained legal title to the property under a mortgage deed executed by Stonybrook Gardens, Inc., a predecessor in title of the defendant, the application of the building code to the property is contrary to the provisions of the Lanham Act and the federal constitution. It is true that as long as the government operated these housing units through its agents it was immune from the effect of the building code. 54 Stat. 1126, 42 U.S.C. § 1521 (b); *United States* v. *City of Chester*, 144 F.2d 415, 420 (3d Cir.); *United States* v. *Philadelphia*, 56 F. Sup. 862, 866 (E.D. Pa.), aff'd, 147 F.2d 291 (3d Cir.), cert denied, 325 U.S. 870, 65 S. Ct. 1410, 89 L. Ed. 1989. Now, however, the property has been sold to a private corporation, and the claim that it is still protected by federal immunity because the government retains the legal title is inaccurate and misleading. What the government did, and all that it did, in addition to making an outright sale, was to take back a mortgage for the balance of the purchase price. The defendant, as mortgagor, is the equitable owner of the property and thus its real owner. The government has merely the security rights of a mortgagee, although owing to our common-law concept of a mortgage as an outright conveyance with a defeasance clause, as distinguished from the "lien theory" of New York and most states outside of New England, the government has what is technically termed a legal title, subject to a right of redemption which persists until it is extinguished by an action of foreclosure. *Chappell* v. *Jardine*, 51 Conn. 64, 69; *Struzinski* v. *Struzinski*, 133 Conn. 424, 428, 52 A.2d 2. This distinction between the common-law and lien concepts of a mortgage is well explained in cases such as *Chappell* v. *Jardine*, supra, 66. Obviously, such a technical legal title as the government has, as mortgagee, is not the equivalent of a legal title in the sense in which the term would be used were the government to be treated as the present owner

or operator of the property. In any true ownership, there is no right of defeasance, nor is any action of foreclosure cutting off a mortgagor's equitable right of redemption necessary to acquire full ownership. The government is not the owner of the property, nor does it have legal title thereto in such a manner as to give the defendant immunity from compliance with the Stratford building code.

There is nothing in the finding or the record to indicate that the government intended to retain ownership, possession or control of the property or that it has in any way attempted so to do. It has retained nothing except its security interest as mortgagee, and this will never ripen into anything more unless there is a default in the mortgage and foreclosure proceedings ensue—something not suggested in this case. The sovereignty of the United States and its attendant immunity from state and local regulations ended with its sale of the property. See *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558, 564, 66 S. Ct. 749, 90 L. Ed. 851. There is nothing in the Lanham Act indicative of a congressional intent that a private purchaser of federal housing is to be shielded by federal immunity from reasonable local regulations designed to protect the public safety. See *Public Housing Administration* v. *Bristol Township*, 146 F. Sup. 859, 863 (E.D. Pa). Congress, in enacting legislation within its constitutional authority, will not be deemed to have intended to invalidate state or local rules for the protection of the public safety unless its purpose so to do is clearly stated. Id., 864, and cases cited. The act neither purports to, nor does, confer any authority on one in the position of the defendant, or on anyone other than the government or one acting in its behalf, to ignore, or fail to comply with, the provisions of a local building code. Of course, under the circumstances, no such authority is conferred by the federal constitution.

The principal claim advanced by the defendant for not having to comply with the provisions of the building code is that, by its own terms, the code does not apply to the housing units. This claim is based on the premise that the units were in existence at the time of the passage, on September 27, 1943, of the code, effective October 27,

1943, and therefore, under the express provisions of the code itself, the units need not conform to its provisions. Insofar as this claim is based on §§ 103 and 104 of the code, it does not merit discussion. Section 502 of the code provides, in part, that "[b]uildings in existence at the time of the passage of this Code, may have their existing use or occupancy continued, if such use or occupancy was legal at the time of the passage of this Code, provided such continued use is not dangerous to life." Since the court made no finding that the use of the housing units is dangerous to life, we are not concerned with that proviso. The adoption of the present code in 1943 took place a year subsequent to the construction of the units. Prior to, and up until, its adoption, there was in existence in Stratford another building code, adopted in 1925, and amended in 1932. It contained substantially the same requirements as the present code with respect to the obtaining of a certificate of occupancy and the maintenance of noncombustible floors under furnaces of dwelling units. Stratford Bldg. Code §§ 7, 177 (1925 as amended). It was repealed by § 17 of the present building code ordinance. The basic issue presented by the defendant's claim is whether the use or occupancy of the housing units was legal at the time of the passage of the present building code in 1943 within the meaning of § 502 of the code, quoted above. The legality of the use, within the meaning of § 502, depends on the nature of the use, rather than on the identity of the user.

The use and occupancy, as such, of the housing units could not have been legal in 1943 because they did not conform to the provisions of the 1925 building code, which was in existence prior to the time of the construction of the units. See *Wallingford* v. *Roberts*, 145 Conn. 682, 684, 146 A.2d 588. The fact that the 1925 code was repealed on passage of the present code does not make the use and occupancy legal. Where a building is constructed or a use commenced in violation of an ordinance which is repealed by another ordinance containing the same restrictions against the building or the use, and also containing a provision that the existing uses of all buildings which com-

plied with the repealed ordinance should be unaffected, the restrictions of the new ordinance apply to the building or the use, and it is not entitled to the status of a legal nonconforming use. *Troutman* v. *Aiken*, 213 Ga. 55, 56, 96 S.E.2d 585; *Leigh* v. *Wichita*, 148 Kan. 607, 613, 83 P.2d 644; *Rapasadi* v. *Phillips*, 2 App. Div. 2d 451, 453, 156 N.Y.S.2d 746; 8 McQuillin, Municipal Corporations (3d Ed.) § 25.186; see *Adley* v. *Paier*, 148 Conn. 84, 86, 167 A.2d 449. Any contrary rule would impute an intent in a new municipal code or ordinance to legalize every violation of the provisions of a previous code or ordinance even though those provisions had been carried over without substantial change. See *Rapasadi* v. *Phillips*, supra. The mere statement of such a proposition demonstrates its absurdity. It is not the law. Rhyne, Municipal Law, p. 234 § 9-7, p. 236 § 9-9.

The sole reason that the housing units here could be used notwithstanding the provisions of the building code was that, under the Lanham Act, the government did not have to comply with the code. Once the government relinquished jurisdiction over the units, governmental immunity ceased. The Lanham Act conferred no immunity on the property, as such. It merely conferred immunity on the government, and those acting in its behalf, during the period of government ownership and control. The housing units here were not built in accordance with the 1925 building code, as amended in 1932, and they were not in existence when that code was adopted or even when it was amended. The use and occupancy, as such, did not conform to the provisions of that code. These were substantially the same provisions as are in dispute here, and the units could not become legal nonconforming uses so as to be protected by the present code. That code is applicable, by its terms, to the units. Since they never became legal nonconforming uses, the application to them of the code is not unconstitutional as a taking of property without due process or as an unreasonable exercise of the police power, or in any other respect.

Two other claims of the defendant are that the town of Stratford is estopped from enforcing against the defendant the requirements of the building code relating to certificates of occupancy and noncombustible floors under furnaces, and

further, that such action is barred by laches. The finding lacks facts which would support either claim. Although the defendant's draft finding and appendix recite additional material relating to these claims, not all of it can be added to the finding as admitted or undisputed. See Practice Book § 397; *Greco* v. *Morgaldi*, 145 Conn. 685, 687, 146 A.2d 589; *Somers* v. *Hill*, 143 Conn. 476, 481, 123 A.2d 468. Additional findings material to these two claims, together with the corrections to which the defendant has shown itself entitled, will now be summarized. In February, 1956, shortly after the government sold the housing units, the building inspector of Stratford notified the Alperts that the heating units violated the building code because they lacked fireproof floors. At that time, the Alperts agreed to correct the violations and to construct fireproof floors in all the furnace rooms, and the building inspector allowed one year for the correction of the violations. In March, 1957, thirteen months later, this time was extended until June 13, 1957. Finally, the building inspector delayed six more months from that date before filing a complaint. There is nothing in these circumstances justifying a conclusion that the town is estopped from enforcing its building code against the defendant or that enforcement is barred by laches.

The general rule is that the law of estoppel will not be applied to prevent a municipality from exercising its police power. 38 Am. Jur. 375; note, 1 A.L.R.2d 338, 349; see *Pallman* v. *East Haven*, 135 Conn. 593, 594, 67 A.2d 560. Mere delay in the institution of an action to compel compliance with municipal regulations will not constitute laches so as to bar the action. *Wallingford* v. *Roberts*, 145 Conn. 682, 685, 146 A.2d 588. Almost two years after the first promise to make the alterations necessary to bring the housing units into conformance with the building code, the violations had not been corrected. An estoppel rests on the misleading conduct of one party which operates to the prejudice of the other. *Franke* v. *Franke*, 140 Conn. 133, 139, 98 A.2d 804. The fact that a building permit was issued in October, 1956, for the alteration of the housing units to conform to the building code And that this permit

was not revoked does not show misleading conduct on the part of the town of Stratford. The permit was obviously to enable the Alperts to carry out their expressed intention to make the housing units conform to the code. A reasonable time for completion of this work was given, and the time was extended even further because actual progress toward this end was being made. Under these circumstances, neither the defendant nor its predecessors were misled or prejudiced. The money expended to repair the housing units is not lost. The work can still be completed, and when the units conform to the building code, proper certificates of occupancy can be obtained. For the same reasons, this prosecution is not barred by laches. *Kurzatkowski v. Kurzatkowski*, 142 Conn. 680, 684, 116 A.2d 906. Certain other claims either were not properly raised or do not merit discussion.

There is no error.

In this opinion the other judges concurred.

APPENDIX B

At a Supreme Court of Errors, holden at Hartford on the first Tuesday of April, 1962.

No. 5108

STATE OF CONNECTICUT,

v.

STONEYBROOK, INC.

ON APPEAL FROM THE COURT OF COMMON PLEAS FOR FAIRFIELD COUNTY

This appeal by the defendant, claiming error in the process, record and judgment, and in the proceedings and decision of the Court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts on file in this Court, was allowed by the Court of Common Pleas, for Fairfield County, on the 20th day of March, 1959, and came to this Court at its session at Hartford, on the first Tuesday of February, 1961; and thence by continuance to the present term, when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment and proceedings of said Court of Common Pleas there is no error.

It is therefore considered and adjudged that there is no error.

The Court:

Date of Judgment May 8, 1962.

Decision Announced May 22, 1962.

/s JOHN CAMPANA,
Clerk.

APPENDIX C

Mr. O'Connell: This is case Number 9913, State vs Stonybrook, Inc., which is set down for disposition this morning, Your Honor.

The Court:

The Court would like to preface what it will have to say by saying that, as you recall, this case was quite extensively tried and I might say very able and competently tried by both the prosecuting attorney and counsel for the defense, so that, in view of the various involved questions of law and fact, the Court's decision will be rather extensive, too.

This is an appeal from the Town Court of Stratford. The information before this court charges the defendant with five separate violations. The defendant entered a plea of not guilty to all counts. The State is not pressing the fourth and fifth counts, namely, the failure to file certificates of incorporation and organization respectively, since these alleged violations were remedied prior to the trial. Consequently, the first three counts remain for determination by the Court. These counts are the failure of the defendant to obtain certificates of occupancy for each of the 400 dwelling units, (400 counts.) The second count charges a violation of the Stratford Building and Plumbing Code, in that each of the 400 dwelling units contained a combination sink and tub having only a single trap (400 counts). And the third count charges a violation of the Stratford Building Code in that 240 dwelling units failed to have a non-combustible floor under the furnace in each of said units (240 counts).

Stonybrook, Incorporated, a Connecticut corporation and the defendant in this action, is the present owner of 400 dwelling units known as Stonybrook Gardens located in the Town of Stratford. These housing units were originally constructed as a Defense Housing Project by the Federal Government in the years 1941-1942, under the

provisions of the Lanham Act, passed October 14, 1940, to meet the housing shortage.

It is conceded by all parties that the project was of a permanent nature. Initially, it was turned over to the control of the Bridgeport Housing Authority as an agent of the Federal Public Housing Authority. Thereafter, on June 30, 1943, this housing project was turned over to the Stratford Housing Authority which had come into existence and was so operated until January 2, 1956, when the Federal Government sold the entire project to Stonybrook Gardens, Inc. Shortly thereafter, Messrs. Hyman and Alpert who were incorporators in Stonybrook Gardens, Inc., took title and on January 17, 1957, they transferred title to Stonybrook, Inc., the present owner.

During the period of construction of the project by the Federal Government, it never sought nor obtained any Certificates of Occupancies for the housing units, nor did the construction fully conform with the then existing Building and Plumbing Code of the Town of Stratford.

It is well established that, where the United States or its agents are performing a governmental function, it is deemed exempt from State interference by taxation or regulation. Citing—*First National Bank of Hartford* vs *Hartford*, 273 U.S. 548.

Furthermore, the Lanham Act passed in Congress on October 14, 1940, under Code 862, Sec. 8, 54 Stat. 1125, as amended by 42 U.S.C.A., 1521, specifically, provides that the Administration has the power to construct buildings "without regard to . . . . State or municipal laws, ordinances, rules or regulations".

It is significant that the very purpose of the legislation was of an emergency nature to alleviate the housing shortage caused by World War II. The very intent of the Lanham Act was to permit the Federal Government to construct housing projects as quickly as possible, notwithstanding and without regard to state or municipal laws, ordinances, rules or regulations. By the enactment of the Lanham Act, Congress decreed that housing for persons engaged in national defense activities was essential

to the National defense. Such legislation is clearly within the war powers granted to Congress by the Constitution. United States vs Chester, 144 F. (2d) 415.

It is abundantly clear that the Federal Government therefore was exempted during the period of construction and control of the housing project from any local regulations or ordinances. Apparently all counsel are in complete accord on this point.

The Court points out that no evidence was offered indicating the defendant is in violation of any specific zoning regulation. As a matter of fact, all the evidence is directed to violations of the Stratford Building and Plumbing Code and the Information itself specifies violations of the Building and Plumbing Code.

The State contends immunity from local regulations ceases upon a transfer of ownership from the Government to private ownership. The defendant, during the course of the trial, proceeded on the theory that the immunity which the Federal Government enjoyed would also inure to the benefit of a private owner who acquired title from the Government. However, the defendant has abandoned this theory in its brief and now contends that the buildings having been erected under the Federal immunity must be permitted to remain as they originally existed at that time and no change in their use and occupancy other than a change of ownership has occurred.

Although the defendant has abandoned its claim of continuing immunity, the Court would have been impelled to hold that the position taken by the State is logical. The pertinent statute specifically grants immunity only to the Federal Government and there are no reported cases which in any way support the theory of continuing immunity to a private owner who purchases such a project from the Government. To the contrary, the prevailing law would indicate that whenever the Federal Government unrestrictedly transfers propery to private persons, whatever immunity the property enjoyed while owned by the United States terminates and the property becomes subject to applicable State and local laws. In such case, the property, under State laws, would be subject to taxation,

zoning, housing and building regulations unless excepted by State law. Citing—*Buchser* vs *Buchser*, 231 U.S. 157 S.A.L.R., Inc., vs *Hinn*, 327 U.S. 558.

The Court is unable to accept the present theory advanced by the defendant wherein it claims that the building in question must be permitted to remain as they were originally constructed by the Federal Government. There are two weaknesses with this claim. In the first place the status quo was completely changed. As pointed out, the project was constructed as a war measure to relieve the housing shortage for persons engaged in national defense activities. It must be conceded that this condition is not prevalent at the present time.

Secondly, the defendant is attempting to construe Section 502 of the Stratford Building Code so that the violations which arose while the project was being constructed and under control of the Federal Government, would be perpetuated ad infinitum by a private owner. What may have been legal under Government ownership, does not necessarily make it legal after the Government divested itself of title by sale to the defendant's predecessor in title.

It is highly significant and fully supported by the evidence that the defendant and its officers had full knowledge of the violations before the sale of the project by the Government. As bidders, they received notice of the violations and within a month or so after acquiring title, a meeting was held at which time again, the defendant and its attorney were informed by the Building Inspector of the various violations. The defendant was also informed by a letter concerning the violations and various other communications went back and forth between the Building Inspector and the defendant. The ultimate result of the meetings and communications was that the defendant agreed to correct the existing violations.

Section 206 of the Stratford Building Code provides that "No building shall be occupied in any part thereof unless or until a certificate of occupancy has been issued by the Building Inspector. The Building Inspector shall, after an application has been filed by the owner or his agent, issue a Certificate of Occupancy for such building, if after in

spection it is found such building complies with the provisions of this code and all other requirements of law or ordinance applicable thereto."

There is no ambiguity in the above section. As a condition precedent for occupancy, a certificate of occupancy must be obtained. In the case of *Second National Bank of New Haven* vs. *Loftus*, 121 Conn. 454, the Supreme Court held that Sec. 2592 of the General Statutes, now Sec. 4079, requiring a building inspector's certificate under the Tenement House Act, makes unlawful the occupancy of any tenement house within the purview of the Act until the issuance of the certificate. Aside from that, and as previously pointed out, the Federal Government was not required to obtain certificates of occupancies. The defendant never was and is not now in that position. It cannot claim it stands in the shoes of the Federal Government.

It may very well be that as of now, all the violations have been eliminated and upon application the defendant might be entitled to obtain Certificates of Occupancies, but upon the evidence before it and the applicable law, the Court is impelled to find the defendant guilty on the First Count for failure to obtain Certificates of Occupancies, for 400 dwelling units, (making 400 counts.)

As to the Second Count, the Court finds the State has failed to prove beyond a reasonable doubt that the combination sink and tub units in each of the dwelling units was a violation because of having only a single trap. The Court finds the defendant not guilty on the Second Count.

As to the Third Count, the defendant takes the same position, not of continuing immunity from the Federal Government, but rather that the violations were present when the Government constructed the buildings and if legal then are legal now. The Court has already pointed out there is no merit to the defendant's claim on this point. Nor is there any merit to the claims raised in the defendant's brief of the Statute of Limitations and Laches.

Under the third count, the State claims the defendant failed to have non-combustible floors under the furnaces in 240 units, as required by the Building Code. The State

agrees that at the time of trial some 54 units were in violation, the balance having been remedied by the defendant.

The Court finds no difficulty in holding that the failure to have non combustible floors under the furnaces is in complete violation of the Stratford Building Code. The Court finds the defendant guilty on 54 counts under the Third Count of the Information.

Mr. O'Connell:

It is my recollection that in Stratford a fine of $5. was imposed for each violation. I would see no reason for changing that figure here, Your Honor. I would suggest that the same fine be imposed.

Mr. Hoyt:

Your Honor, there is one question as you know, we intend to appeal this decision. Would it be all right if we continued the same bond that we are on now?

Mr. O'Connell:

I think you have to post a new bond, Mr. Hoyt.

Mr. Hoyt:

I would like to request——

The Court:

Before I do that, suppose I impose the penalty. On the First Count, on which the Court found the defendant guilty on 400 counts, the Court imposes a fine of $5. on each count; and on the Third Count of 54 violations, the Court imposes a fine of $5. on each of the 54 counts.

Mr. O'Connell:

In view of the fact that the fine will run around $2200., might a bond in the sum of $2500. be set?

Mr. Hoyt:

That would be agreeable.

The Court:

Who is appearing for the defendant?

Mr. Hoyt:

Mr. Maloney, he is the manager and agent for the defendant, he is the agent in charge.

The Court:

That will be the sentence of the Court and a bond of $2500 is set for an appeal bond.

Mr. Hoyt:

Thank you, Your Honor.

APPENDIX D

Constitution of the United States

Art. IV, Section 3, Clause 2:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . .

Fourteenth Amendment, Section 1:

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Lanham Act as Amended

42 U.S.C. § 1521:

In order to provide housing for persons engaged in national-defense activities, and their families, and living quarters for single persons so engaged, in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Housing and Home Finance Administrator (hereinafter referred to as the "Administrator") is authorized:

. . . . . .

(b) By contract or otherwise (without regard to . . . any Federal, State, or municipal laws, ordinances, rules, or regulations relating to plans and specifications or forms of contract, the approval thereof or the submission of estimates therefor) . . . to make surveys and investigations, plan, design, construct, remodel, extend, repair, or demolish

structures, buildings, improvements, and community facilities . . ., and do all things necessary in connection therewith to carry out the purposes of this subchapter: . . . *Provided*, That the cost per permanent family-dwelling unit shall not exceed an average of $3,750 for all types of construction for those units located within the continental United States . . . , and the cost of no family-dwelling unit shall exceed $4,500 within the continental United States . . . , exclusive of expenses of administration, land acquisition, public utilities, and community facilities . . . : *Provided further*, That where the Administrator shall consider that there is no reasonable prospect of disposing of such housing to meet a need extending beyond the emergency he shall construct temporary units: . . .

42 U.S.C. § 1524:

It is declared to be the policy of this subchapter to further the national defense by providing housing in those areas where it cannot otherwise be provided by private enterprise when needed, and that such housing may be sold and disposed of as expeditiously as possible: *Provided*, That in disposing of said housing consideration shall be given to its full market value and said housing or any part thereof shall not, unless specifically authorized by Congress, be conveyed to any public or private agency organized for slum clearance or to provide subsidized housing for persons of low income: . . .

42 U.S.C. § 1544:

Notwithstanding any other provision of law, whether relating to the acquisition, handling, or disposal of real or other property by the United States or to other matters, the Administrator, with respect to any property acquired or constructed under the provisions of subchapters II-VII of this chapter, is authorized . . . (c) to rent, lease, exchange, sell for cash or credit, and convey the whole or any part of such property . . . .

42 U.S.C. § 1545:

. . . Consultation shall be had with local public officials and local housing authorities to the end that projects constructed under the provisions of subchapters II-VII of this chapter shall, so far as may be practicable, conform in location and design to local planning and tradition.

42 U.S.C. § 1548:

The Administrator is authorized to make such rules and regulations as may be necessary to carry out the provisions of subchapters II-VII of this chapter, and shall establish reasonable standards of safety, convenience, and health.

STRATFORD BUILDING CODE

Section 206:

No building shall be occupied in any part thereof unless or until a Certificate of Occupancy has been issued by the Building Inspector. The Building Inspector shall, after an application therefor has been filed by the owner or his agent, issue a Certificate of Occupancy for such building, if after inspection it is found that such building complies with the provisions of this Code and all other requirements of law or ordinance applicable thereto. . . .

Section 305 (as amended):

It shall be unlawful for any person, firm or corporation to erect, construct, enlarge, alter, repair, move, remove, demolish, convert, equip, use or occupy or maintain any building and structure or any portion of any building and structure in the city, contrary to or in violation of any provision of this Code or to cause, permit or suffer the same to be done.

Any person, firm or corporation violating any of the provisions of this Code shall be deemed guilty of a misdemeanor and each such person shall be deemed guilty of a separate offense for each and every day or portion thereof

during which any violation of any of the provisions of this Code is committed, continued or permitted, and upon the conviction of any such violation such person shall be punishable by a fine of not more than $100.

. . . . . .

Section 101:

For the purposes of this Code, certain terms, phrases, words and their derivatives shall be construed as set out in this section.

. . . . . .

(o) OCCUPANCY is the purpose for which a building is used or intended to be used. Change of occupancy is not intended to include change of tenants or proprietors.

. . . . . .

Section 502:

. . . . . .

Buildings in existence at the time of the passage of this Code may have their existing use or occupancy continued, if such use or occupancy was legal at the time of the passage of this Code, provided such continued use is not dangerous to life.

Section 3707:

. . . . . .

Every furnace designed to burn solid or liquid fuel shall set upon a masonry floor or be placed on a bed of not less than four inches (4") of masonry and every portion thereof including the smoke pipe shall be at least two feet (2') from any combustible material or such combustible material shall be protected by a covering of No. 24 U.S. Gauge galvanized iron [illegible] furred with metal furring not less than one and one-half inches (1½") from such combustible con-

struction or shall be entirely covered by one-hour fire-resistive construction. Any such furnace set in masonry shall be completely and tightly covered with at least four inches (4") of brick, concrete, tile, sand or a combination of such materials. Every such furnace shall be connected to a regulation chimney as specified in Section 3701.

(4063-4)

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 470

STONYBROOK, INC.,

Appellant,

v.

STATE OF CONNECTICUT,

Appellee.

APPEAL FROM THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

MOTION TO DISMISS.

JAMES J. O'CONNELL,
THOMAS J. DOLAN,
1016 Broad Street,
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Attorneys for Appellee.

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OCTOBER TERM, 1962

No. 470

STONYBROOK, INC.,

Appellant,

v.

STATE OF CONNECTICUT,

Appellee.

MOTION TO DISMISS.

Appellees move, pursuant to Rule 16(b), that the appeal from the final judgment of the Supreme Court of Errors be dismissed on the grounds that the federal question sought to be reviewed was (a) not timely or properly raised, and (b) not expressly passed upon either by the Supreme Court of Errors or the Court of Common Pleas.

OPINION BELOW.

The opinion of the Supreme Court of Errors is reported at 181 A2d 601 and is also found in Appendix A of the Jurisdictional Statement. The opin-

ion of the Court of Common Pleas is not reported but is found in Appendix C of the Jurisdictional Statement.

JURISDICTION.

The final judgment of the Supreme Court of Errors of Connecticut was filed on May 8, 1962. After timely Motion for Reargument, notice of appeal was filed by the appellant on August 1, 1962. The jurisdiction of this Court is sought to be involved under 28 U.S.C. §1257(2) and 28 U.S.C. §2101 (c).

Jurisdiction is challenged by this motion.

QUESTIONS PRESENTED.

The appellant has set forth at pages 2-3 of its Jurisdictional Statement the three questions it seeks to present to this Court on appeal.

STATEMENT OF THE CASE.

The first two paragraphs of the opinion of the Connecticut Supreme Court sets forth the factual background as follows:

> "King, J. The defendant was tried on a criminal information charging it, in five counts, with certain violations of municipal regulations of the Town of Stratford. It was found guilty, under the first count, of permitting its dwelling units to be occupied by rent-paying tenants without its having obtained proper certificates of

occupancy as required by Stratford's regulations, and, under the third count, of failing to provide noncombustible flooring under the furnaces in fifty-four of its dwelling units as required by the Stratford building code. It was found not guilty of the offenses charged in the second count, and the fourth and fifth counts were withdrawn.

"The facts necessary for an understanding of our decision concerning most of the claims of error properly before us will now be summarized. On August 1, 1941, the United States government, hereinafter referred to as the government, condemned land in Stratford and began the construction of housing units under the provisions of the Lanham Act, 54 Stat. 1125, as amended, 42 U.S.C. §1521. The units were constructed under the supervisions of the Bridgeport Housing Authority and were operated for the government by that authority until June 30, 1943, when the newly established Stratford housing authority took over the operation under a lease from the government, pursuant to federal regulations, and operated the units until January 17, 1956. During this entire period of construction and operation by the government through the agency of the housing authorities, no certificates of occupancy for the housing units were ever obtained, nor did the construction fully conform to the requirements of the building code of Stratford. On January 17, 1956, the government sold the entire project to Stonybrook Gardens, Inc., a private corporation. Two hundred thousand dollars was paid on the purchase price, and a mortgage on the property

was given to the government as security for the balance. Thereafter, on the same day, Stonybrook Gardens, Inc., conveyed the property to Hyman Alpert and Joseph Alpert; on January 10, 1957, they conveyed it to the defendant. Both Stonybrook Gardens, Inc. and the defendant are corporations owned by the Alperts. Before the housing units were sold by the government to Stonybrook Gardens, Inc., the Alperts met with the building inspector of Stratford and were put on notice as to the violations of the building code. At that meeting, the Alperts said that these violations would be taken care of. The violations had been noted by the building inspector when he made an inspection of the housing units in January, 1955. A copy of this inspection report was given to the Alperts before the units were purchased by them. Fifty-four furnaces in the units did not, at the commencement of the present prosecution, have noncombustible floors, as required by the building code. No certificates of occupancy had been obtained. Private owners are required by §206 of the building code of Stratford to obtain certificates of occupancy and by §3707 to have noncombustible floors under the furnaces of housing units such as these. The government admittedly was not bound by these provisions, since an express provision in the Lanham Act empowered the government to construct buildings under the act 'without regard to . . . State, or municipal laws, ordinances, rules or regulations.' 54 Stat. 1126, 42 U.S.C. §1521(b)."

Further, the 1925 Stratford Building Code, as

amended in 1932, contained provisions virtually identical to the 1943 Code insofar as the applicable provisions involved in the present case are concerned.

The Connecticut Supreme Court of Errors upheld the conviction of the defendant-appellant in a unanimous decision.

ARGUMENT:

I.

Questions 2 and 3 Sought to be Presented by the Appellant Were Neither Raised in its Appeal to the Connecticut Supreme Court of Errors Nor Expressly Passed Upon by the Connecticut Court.

Under Connecticut Practice, error is not to be considered by the Supreme Court unless it is specifically assigned on appeal.

> "Errors considered. This court shall not be bound to consider any errors on an appeal unless they are specifically assigned and unless it appears on the record that the question was distinctly raised at the trial and was ruled upon and decided by the court adversely to the appellant's claim, or that it arose subsequent to the trial."
>
> **Connecticut Practice Act**, 1951 Rev., §409.

The principle has been followed in innumerable cases by the Supreme Court of Errors. See **Maggi v.**

Mendillo, 147 Conn. 663, 670 (1961) and cases cited therein.

The assignment of errors made by the appellant as well as the pertinent provisions of the Finding referred to therein, are set forth in Appendix "A" to this motion. Nowhere is mention made of the claims now advanced in Questions 2 and 3 of the Jurisdictional Statement.

It is a basic principle of appellate procedure, in this court as well as the Connecticut Court, that issues and claims of law must be clearly and timely presented in the lower courts if review on appeal is to be sought. An analysis of the opinions of the Court of Common Pleas, the Supreme Court of Errors and the appellant's assignment of errors will disclose that the following were its only claims of law pursued diligently and properly:

1. Since the government has retained legal title under a mortgage deed executed by Stonybrook Gardens, Inc., the application of the building code to the property is contrary to the provisions of the Lanham Act and the federal constitution.

2. The use and occupancy of the housing units was legal at the time of the passage of the present building code in 1943, within the meaning of §502 of the code.

3. The prosecution was barred by laches and estoppel.

These were the only claims properly raised and

expressly passed upon by the Supreme Court of Errors, as is apparent from a reading of the opinion.

The first claim of the appellant will be treated hereinafter.

Questions 2 and 3 were never considered by either of the Connecticut Courts and were never raised by the appellant until its Motion for Reargument.

The appellant's second claim concerns the interpretation of a municipal ordinance. The construction of the Connecticut Supreme Court of Errors upon Section 502 of the Stratford Building Code is binding upon this Court. **Poulos v. New Hampshire,** 345 U.S. 395, 402 (1953). No claim was advanced by the appellant that such an interpretation would violate the federal constitution until after the decision of the Connecticut Supreme Court of Errors was announced. Therefore, its present claim was never considered by the lower court.

Admittedly the issues of laches and estoppel are not subjects of this appeal.

Therefore, the appellee respectfully submits that Questions 2 and 3 of the appellant's appeal:

(a) are neither timely nor properly presented, and

(b) were not expressly passed upon by the Connecticut Supreme Court of Errors.

II.

The Provisions of 28 U.S.C. §1257(2) are Not Applicable in This Appeal Insofar as the Interpretation of the Lanham Act (54 Stat. 1125, as amended, 42 U.S.C. §1521) is Concerned.

The first question presented by the appellant is solely concerned with the interpretation of the meaning and intent of the Lanham Act by the Connecticut Supreme Court of Errors. Essentially, the appellant claims that the intent of the Lanham Act is to shield a private purchaser from local regulations. The Connecticut court has interpreted the Lanham Act thusly:

> "The sovereignty of the United States and its attendant immunity from state and local regulations ended with its sale of the property. See **S.R.A., Inc. v. Minnesota,** 327 U.S. 558, 564, 66 S. Ct. 749, 90 L. Ed. 851. There is nothing in the Lanham Act indicative of a congressional intent that a private purchaser of federal housing is to be shielded by federal immunity from reasonable local regulations designed to protect the public safety. See **Public Housing Administration v. Bristol Township,** 146 F. Sup. 859, 863 (E.D. Pa). Congress, in enacting legislation within its constitutional authority, will not be deemed to have intended to invalidate state or local rules for the protection of the public safety unless its purpose so to do is clearly stated. Id., 864, and cases cited. The act neither purports to, nor does, confer any authority on one in the

position of the defendant, or on anyone other than the government or one acting in its behalf, to ignore, or fail to comply with, the provisions of a local building code. Of course, under the circumstances, no such authority is conferred by the federal constitution." Jurisdictional Statement, Appendix A; P. 30; **State v. Stonybrook, Inc.,** 181 A2d 601.

What is involved then, is not an issue to be presented on a direct appeal to this Court, but rather one to be raised on a petition for certiorari. The question does not involve the application of the Stratford building code in a manner repugnant to the Lanham Act, but only a construction as to the meaning and intent of the Lanham Act.

A corollary question was the retention of a security interest in the property by way of a mortgage deed by the federal government. It is respectfully submitted that this question has been determined by **S.R.A., Inc. v. Minnesota,** 327 U.S. 558 (1945).

CONCLUSION.

Wherefore, the Appellee submits that the motion to dismiss the appeal be granted.

Respectfully submitted,

JAMES J. O'CONNELL,

THOMAS J. DOLAN,

Attorneys for the Appellee.

APPENDIX A

ASSIGNMENT OF ERRORS.

Now comes defendant-appellant, by its attorney, and respectfully alleges that the Court erred:

A.

Errors Apparent On The Face Of The Record.

1. In finding defendant guilty and imposing a fine of $2,270.00 under the First and Third Counts of the Information.

2. In that the First Count does not warrant a judgment of guilty thereunder, because:

(a) The use and occupancy of the buildings of Stonybrook Gardens by defendant, as further referred to in paragraphs 6, 7 and 8 of the Court's findings of December 28, 1960, is a legal, pre-existing, non-conforming use of that property, and the buildings thereof are not in violation of Sections 206, 3707, or any other provision of the Building Code or the Plumbing Code of the Town of Stratford.

(b) The buildings of Stonybrook Gardens, used, owned and occupied by the defendant or its representatives, were "buildings in existence" before the enactment of the 1943 Building Code, within the meaning of Sections 104 and 502 of that Code, and therefore are not buildings for which Certificates of Occupancy are required under Section 206 thereof, as charged in the

First Count of the Information under which defendant was found guilty, as stated in paragraph 29 of the Court's findings.

(c) The use and occupancy of the buildings of Stonybrook Gardens, on the part of the defendant was not a change of use and occupancy requiring a Certificate of Occupancy under Section 207 of the Stratford Building Code of October 27, 1943.

3. In that the Third Count does not warrant the judgment of guilty thereunder, because:

(a) The State has not sustained its burden of proof in establishing defendant's guilt of the 54 violations found thereunder as stated in paragraph 30 of the Court's findings.

(b) The requirements of Section 3707 of the Building Code of the Town of Stratford with regard to the construction of furnace rooms do not apply to the buildings in Stonybrook Gardens, inasmuch as such buildings were "buildings in existence" as of the effective date of the 1943 Building Code, within the meaning of Section 502 thereof, and such furnace rooms have not been changed in construction subsequent to their original construction in 1942 by the United States, defendant's predecessor in title.

(c) Defendant had secured building permits for the repair of furnace rooms in Stonybrook Gardens, which permits had not been revoked prior to the institution of the Information against it.

4. In that the violations alleged in the First and Third Counts of the Information, under which the defendant was found guilty, as stated in paragraphs 29, 30, 32 of the Court's findings, are barred by the statute of limitations and laches.

5. In overruling defendant's contentions of law, as set forth in paragraphs 1 through 6 respectively of the Fourth Part of defendant's draft findings, filed with the Court on April 20, 1959.

6. In overruling defendant's motion for re-argument, as identified and referred to in paragraph 39 of the Court's findings.

B.

Errors In The Conduct Of The Trial By The Court.

1. In refusing to find the facts set forth in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the First Section of defendant's draft findings of April 20, 1959.

2. In finding the facts set forth in paragraphs 13, 14, 15, 16, 17, 20, 22, 23, 24, 25, 26 and 28 of the Court's findings of December 28, 1960, which findings are without evidence to sustain them; and for the further reason that Stonybrook Gardens is a legal, pre-existing, non-conforming use, the buildings of which all were constructed prior to the enactment of the Building Code of October 27, 1943, and to which property and buildings provisions or requirements of the Building Code and the Plumbing Code of the Town of Stratford are not applicable in the manner found by the Court in paragraphs 9, 10, 11,

12, 16, 17, 18, 20, 22, 23, 24, 25, 26, 27 and 28 of its findings of December 28, 1960.

3. In adopting the conclusions of law set forth in paragraphs 29, 30 and 32 of the aforesaid findings of the Court.

4. In refusing to strike or dismiss the Third Count of the Information, upon defendant's motion made for that purpose on the ground that no foundation had been laid for a finding of guilty under that Count, in that any building units of Stonybrook Gardens which did not have cement furnace floors were not properly identified.

5. In admitting the testimony of George Wright, a witness for the State, whose testimony in its entirety was immaterial, hearsay and extremely prejudicial in nature.

Respectfully submitted,

HUGH A. HOYT,
Attorney for Defendant.

*See part 4 of finding.

Filed Jan. 12, 1961.

FINDING.

FOURTH.

The defendant made the following claims of law upon which the court ruled as hereinafter stated:

34. The defendant claimed that Stonybrook Gardens, by reason of the Constitution of the United

States and the provisions of the Lanham Act, did not have to comply with the Building Code of the Town of Stratford, while owned by the United States and thus constituted a legal use of the buildings and property during the period of Government ownership even though the conditions found by the Court to be violations of the Building Code were then in existence, that the change of ownership upon sale by the United States did not constitute a change of use of occupancy and that the use and occupancy of the property has not otherwise changed or substantially altered since title was transferred on January 17, 1956, and consequently that the buildings are not in violation of the Building Code since they constituted a legal existing use of the property when the Building Code first became effective with respect to the property.

35. The defendant claimed that the requirement of certificates of occupancy by section 206 of the Building Code of the Town of Stratford does not apply to buildings in existence as of the effective date of the Code, that the buildings in Stonybrook Gardens were in existence as of the effective date of the Code, that the use of the buildings was a legal use as of the effective date of the Code and has not since been changed, and therefore that the failure of defendant to obtain certificates of occupancy is not a violation of the Building Code.

36. The defendant claimed that the requirements of section 3707 of the Building Code of the Town of Stratford with regard to the construction of furnace rooms do not apply to buildings in existence as of the effective date of the Code, that the buildings in

Stonybrook Gardens were in existence as of the effective date of the Code, and that therefore the furnace rooms are not in violation of section 3707 insofar as they have not been changed since constructed by the United States and sold to the defendant or its predecessor in title.

37. The defendant claimed that to the extent that the furnace rooms had not been reconstructed so as to meet all of the requirements of the Code, work was in progress to effect such reconstruction under a building permit that had not been revoked or voided and which work had not been subjected to a stop work order by the Building Inspector, and therefore that none of the furnace rooms were in violation of section 3707 of the Building Code of the Town of Stratford even if compliance therewith is required.

38. The defendant claimed that the prosecution is barred by the statute of limitations or by laches.

39. The defendant claimed, in a motion for reargument, that even if certificates of occupancy are required by section 206 of the Building Code of the Town of Stratford with respect to Stonybrook Gardens, not more than 197 certificates are necessary as there are only 197 buildings and thus that not more than 197, rather than 400 as charged and found, violations of the section could exist.

Notwithstanding these claims the court overruled the same and rendered judgment as on file.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 170

STONYBROOK, INC.,

Appellant,

STATE OF CONNECTICUT,

Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 470

STONYBROOK, INC.,

Appellant,

v.

STATE OF CONNECTICUT,

Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellee has moved to dismiss on the ground that this Court lacks jurisdiction of the appeal. There is no suggestion that the federal questions presented are not substantial or should not be considered by this Court if it has jurisdiction. The jurisdictional statute relied upon by appellant is 28 U.S.C. § 1257(2), which provides that final judgments rendered by the highest court of a state in which decision may be had may be reviewed by this Court:

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

We believe that the Jurisdictional Statement demonstrates this Court's jurisdiction under that statute, but we deal more fully in this brief with the objections raised in the Motion to Dismiss.

Appellant contends, in its Jurisdictional Statement, that certain provisions of the Stratford building code, as construed and applied to appellant in the opinion and judgment of the Connecticut Supreme Court of Errors, (1) are contrary to the Lanham Act, (2) interfere with the disposition by the United States of its property in violation of the federal constitution, and (3) discriminate against the United States and those with whom it deals in violation of the federal constitution. An appeal lies to this Court where a state court rejects claims that a state statute is invalid as applied in the particular case by reason of the federal constitution or laws, as well as in those situations where the claimed invalidity extends to the state statute on its face or *in toto*. *Danke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 287-289 (1921); Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, §11, pp. 21-24 (Wolfson & Kurland ed., 1951).

Appellee claims, however, that this Court does not have jurisdiction on appeal of the Lanham Act issue because it can be brought here only by petition for writ of certiorari, and that this Court does not have jurisdiction of the constitutional issues because they were neither raised before nor expressly passed upon by the Connecticut Supreme Court of Errors. No other objections have been suggested by appellee, and we show below that those which have been suggested are without merit. We deal first with jurisdiction of the constitutional issues.

Jurisdiction of the Constitutional Issues

A. The claim of discrimination against the United States and those with whom it deals was first made in the Motion for Reargument filed by appellant in the court below and denied by that court without opinion.[1] But as pointed out in the Jurisdictional Statement (p. 9) and in the Motion for Reargument (pp. 8-9), without denial by appellee, that issue arose from an interpretation of Section 502 of the Stratford building code by the Supreme Court of Errors which had not been suggested by the trial court or by appellee, and which could not reasonably have been anticipated by appellant prior to the opinion of the Supreme Court of Errors. Consequently, the Motion for Reargument was appellant's first opportunity to raise the issue. This is sufficient for purposes of the jurisdiction of this Court over the issue even though the court below denied the Motion without opinion. *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 677-678 (1930); *Missouri v. Gehner*, 281 U.S. 313, 320 (1939); Robertson & Kirkham, *supra*, § 76, pp. 130-131.

Section 502 of the Stratford building code authorizes the continuance, without compliance with other provisions of the code, of "legal" uses in existence as of the time the code was enacted in 1943, if not dangerous to life. Appellant contended at all times that the existing use of Stonybrook Gardens by the Government was "legal" by reason of the Property Clause of the Constitution and the express provisions of the Lanham Act when the building code was enacted, that the change in ownership did not constitute a change in use, and that Section 502 otherwise was applicable to Stonybrook Gardens. In its opinion, the

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[1] The Motion for Reargument is part of the record filed in this Court. Concededly (Motion to Dismiss, at p. 2), the Motion was timely.

trial court held that "the Federal Government . . . was exempted during the period of construction and control of the housing project from any local regulations or ordinances," noted that "all counsel are in complete accord on this point," but held with reference to Section 502 that: "What may have been legal under Government ownership, does not necessarily make it legal after the Government divested itself of title by sale to the defendant's predecessor in title."[2]

Appellant assigned this ruling as error[3] and on the appeal vigorously attacked the trial court's ruling that the change of ownership effected a change in the use of Stonybrook Gardens or of its legality so that it ceased to be a "legal" pre-existing use under Section 502 upon sale by the Government. The Supreme Court of Errors agreed that the change in ownership was not material to the legality of the use under Section 502,[4] but held that the use of the property by the Government (and thus by appellant) was not "legal" within the meaning of that word as used in Section 502 which was construed to include only uses authorized by prior Stratford building codes.[5] As shown above, this interpretation of "legal" had not been adopted or suggested by the trial court, it had not been urged by appellee, and appellant could not reasonably be expected

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[2] Jurisdictional Statement, App. C, pp. 38, 39. In paragraph 26 of its findings (which are in the record filed here) the trial court similarly found that: "Although the violations were not illegal under government ownership of the property, such violations could not become legal as a result of the government divesting itself of title to the defendant's predecessor in title."

[3] Paragraphs A.2. (a) (b) and (c), A.3. (a) and (b), A.5. and B.2. of Assignment of Errors (Motion to Dismiss, App.A; pp. 1a-6a).

[4] "The legality of the use, within the meaning of § 502, depends on the nature of the use rather than on the identity of the user." Jurisdictional Statement, App. A, p. 31.

[5] Jurisdictional Statement, App. A., pp. 31-32.

to anticipate that a use expressly authorized by federal law would not be classified as a "legal" use. Certainly, we were not and are not aware of any prior decisions suggesting that Section 502 would be so interpreted.[6]

In the Motion for Reargument, appellant contended that this highly restrictive interpretation of "legal" in Section 502 was unjustified by precedent or reason, could not have been intended by the Town of Stratford, and that (pp. 6-7):

> "If the Town of Stratford did so intend to discriminate against property erected in compliance with Federal rather than local law, as this Court in effect holds by its ruling that only buildings conforming with the provisions of the 1925 Building Code constitute a "legal" use within the meaning of section 502 of the 1943 Building Code, we submit that such a discriminatory application of the ordinance constitutes a violation of the Property and Supremacy clauses of the Constitution of the United States, and of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States."

Appellant then continued in the Motion (pp. 7-8) to advance substantially the same arguments, citing the same cases, as are found with respect to this issue at pp. 24-26 of the Jurisdictional Statement.

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[6] In its opinion (Jurisdictional Statement, App. A., p. 31), the court below suggested that the reader "[s]ee *Wallingford* v. *Roberts*, 145 Conn. 682, 684, 146 A.2d 588," but that case merely held that an existing nonconforming use as a trailer camp had not been created by the movement of five trailers onto the property in question the day before a zoning regulation became effective where the trailers had not been utilized on the land for any purpose or even connected with utilities. Stonybrook Gardens was put into actual use months before adoption of the 1943 building code.

Assuming that the issue properly could be raised on Motion for Reargument, this plainly sufficed to draw into question the validity of the building code, as construed and applied to appellant, under the federal constitution. See Robertson & Kirkham, *supra*, § 11, pp. 21-26. Appellee does not contend otherwise, and this Court took jurisdiction of an appeal from a state court in *Phillips Co. v. Dumas School Dist.*, 361 U.S. 376 (1960), where a similar issue was raised. For the reasons stated and under the authorities cited above, raising the issue for the first time in the Motion for Reargument was sufficient under the circumstances.

B. Appellant's other constitutional contention—that the building code as applied below to sustain the criminal conviction interferes with the disposition by the United States of its property in violation of the federal constitution, particularly in view of the retention by the United States of legal title to the property—was expressly considered and rejected by the Supreme Court of Errors. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). In such circumstances, appellee's contention (Motion to Dismiss, pp. 5-6) that the issue was not raised in the assignment of errors to, and thus need not have been considered by, the Supreme Court of Errors, is immaterial. "So far as the state court discussed these contentions with specific reference to the Constitution of the United States . . . they may be reviewed here [on appeal], notwithstanding the failure of appellants to mention them in their assignment of errors to the state supreme court, as required by its rules." *Nickey v. Mississippi*, 292 U.S. 393, 394 (1934). See generally, Robertson & Kirkham, *supra*, § 83, pp. 143-147.

In its opinion, the Supreme Court of Errors expressly considered appellant's contention that "the application of the building code to the property is contrary to the provisions of the Lanham Act and the federal constitution," in view of the fact that the Government had retained legal title to the property (Jurisdictional Statement, App. A., p. 29). The court below rejected this contention, held that the "sovereignity of the United States and its attendant immunity from state and local regulations ended with its sale of the property," held that the Lanham Act does not confer any authority upon appellant to fail to comply with the building code, and held that "under the circumstances, no such authority is conferred by the federal constitution." (*Id.*, at p. 30.) As noted in the Jurisdictional Statement (p. 7), without denial by appellee, these rulings were made in response to appellant's contentions in brief and oral argument based upon the Lanham Act and the Property Clause of the Constitution.

Indeed, in listing the "claims of law" which it concedes were "pursued diligently and properly" below appellant includes the claim that "the application of the building code to the property is contrary to the provisions of the Lanham Act and the federal constitution" in view of the retention of legal title by the Government. (Motion to Dismiss, p. 6.) We find difficult to understand how appellant can contend, in the face of this concession, that the constitutional issue in this regard (Question 2 in the Jurisdictional Statement) was neither raised before nor expressly passed upon by the Supreme Court of Errors. The issue is one that may be brought here on appeal if properly raised before or passed upon by the state court. See *United States* v. *Allegheny County*, 322 U.S. 174, 192 (1944); *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 97 (1940); *Lee* v. *Osceola Imp. Dist.*, 268 U.S. 643, 644 (1925). The

opinion below expressly identified the "federal constitution" as the instrument relied upon and being considered, thereby establishing the federal nature of the claim in a sufficient manner. See *Bryant v. Zimmerman*, 278 U.S. 63, 67-69 (1928); *Saltonstall v. Saltonstall*, 276 U.S. 260, 267-268 (1928); *Edwards v. Elliott*, 21 Wall. 532, 549-551 (1874); *United States v. Allegheny County*, *supra*, at pp. 180, 192. In short, this constitutional issue is properly here on appeal.[7]

Jurisdiction of the Lanham Act Issue

Appellee concedes that this issue was properly raised below, but contends that it may be brought here only by petition for writ of certiorari and not by an appeal. The concession obviously is justified in view of the extensive consideration given to the issue by the Supreme Court of Errors. See pp. 6-7, *supra*. The stated basis for the contention, on page 9 of the Motion, is that the "question does not involve the application of the Stratford building code in a manner repugnant to the Lanham Act, but only a construction as to the meaning and intent of the Lanham Act."

No authority for this contention has been cited by appellee, and we are not altogether clear as to what is meant by it. The fact that a construction of the Lanham Act is involved cannot be decisive, as disposition of a claim that a state statute is repugnant to a federal statute or to the Constitution necessarily requires a construction of the federal statute or Constitution. There are many cases in

[7] It should be noted, with regard to all the issues before the Court, that appellant is not confined to the exact arguments presented below and may advance different theories or arguments in support of its position on the issues raised or decided below. *Raley v. Ohio*, *supra*, at p. 437, fn. 12; *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899); *see Brannff Airways v. Nebraska Board*, 347 U.S. 590, 599 (1954); Stern & Grossman, Supreme Court Practice, p. 94 (2d ed., 1954).

which this Court has granted an appeal and proceeded to determine whether a state court had properly construed a federal statutory or constitutional provision. *See, e.g., Robinson v. California*, 370 U.S. 660 (1962), decided last term. Apparently the contention must be that the court below did not pass upon a claim that the building code as applied to appellant is repugnant to the Lanham Act, as required by 28 U.S.C. § 1257(2), but only a claim that the Lanham Act afforded appellant a "right, privilege or immunity" for which review is authorized by writ of certiorari under 28 U.S.C. § 1257(3). See Robertson & Kirkham, *supra*, § 16, pp. 34-35.

It is sometimes difficult to determine whether a claim of invalidity of a state statute or a claim of immunity under a federal statute or the Constitution is involved, as this determination appears to depend upon form rather than substance. "There is nothing to prevent the litigant from so phrasing his contention in the state court as to raise the point that his rights and immunities under the federal Constitution prevent the application of the state statute, rather than the point that the state statute, if so applied, would be invalid because repugnant to the federal Constitution, treaties or laws. And where he does so, an adverse decision by the state court is treated as denying his claim of federal rights or immunities, and not as a ruling upon the validity of the state statute, with the result that his remedy in the Supreme Court is by certiorari, not appeal. For this reason, some rather subtle but important distinctions have been drawn." Robertson & Kirkham, *supra*, at pp. 24-25.

While some aspects of the opinion below discuss the Lanham Act issue in terms of "immunity" from local regulation, we believe that the opinion as a whole makes clear that this issue also was raised and considered in terms of whether the Lanham Act invalidated an application of the

building code to appellant. The opinion commences its discussion of the Lanham Act by noting a claim by appellant that "the application of the building code to the property is contrary to the provisions of the Lanham Act and the federal constitution," and concluded, among other things, that the Congress in enacting the Lanham Act "will not be deemed to have intended to invalidate state or local rules for the protection of the public safety unless its purpose to do so is clearly stated."[8]

In any event, we have shown that this Court has jurisdiction on appeal of the constitutional issues. If so, the Lanham Act issue also may be brought here by the appeal even though review of that issue, standing alone, would have to be sought by petition for writ of certiorari. *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547 (1922); Robertson & Kirkham, *supra*, § 21, pp. 48-49. Furthermore, 28 U.S.C. § 2103 provides that where an appeal is improvidently taken "this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken." Appellee has not contended that certiorari should not be granted if the appeal is improvident, and we have shown in our Jurisdictional Statement that the issues presented, including the Lanham Act issue, are both important and substantial and should be decided by this Court. See Rule 19(1)(a) of this Court. We submit, therefore, that this Court has jurisdiction on appeal of the Lanham Act issue and that certiorari should be granted if such jurisdiction is found not to exist.

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[8] Jurisdictional Statement, App. A, pp. 29, 30.

Conclusion

For the reasons stated above and in the Jurisdictional Statement, the Motion to Dismiss should be denied.

Respectfully submitted.

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